

PROMISSORY CONTRACT FOR THE CONSTITUTION OF A RIGHT IN REM OVER IMMOVABLE PROPERTY

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ABSTRACT

Introduction: The Promissory Contract for the constitution of Real Estate Law is a branch of Civil Law namely Law of Obligations. Promissory Contract is a contract by which someone undertakes to enter into a certain contract, it is the definitive contract. As long as the purpose of the promissory contract the parties undertake to perform the promised contract. Timor-Leste is a democratic, sovereign and independent Rule of Law, whose independence was declared and accepted by the United Nations after, May 20, 2002 with international recognition. On the basis of this matter, we must establish a human conduct and ethics that in turn requires the interest of each of the contractors to perform a contract that needs legal basis of our order by which it can be protected by the contract.

Objective: To examine the agreements, and must comply with the obligations established in the law and in the Promissory Contract.

Methodology: We used the deductive methodology in this elaboration, because all the research is done through the library and other references were consulted on the internet as an auxiliary means.

Discussion: It is known that in Timor-Leste, there are many issues with this type of contract, because some people do not fulfill the promises when they perform a certain contract, and this happens because we check some of the impediments and the lack of fulfillment of the contract and also the delay on the part of the debtor and for some reasons for not fulfilling the requirements or assumptions within the respective contract, then arises the impossibility of carrying out the promised contract.

Conclusion: I request a strong performance on the part of the components to oblige citizens to comply with the norm when they enter into this type of contract, the according of the regulation cited by (Corte Real AG & Tilman CB, 2023).

KEYWORDS: Commitment, Civil Law, Law of Obligations, Law and Real Estate.

INTRODUCTION

The term or word "contract" comes from the Latin "contractus"; hence, the contract is regarded as a source of classical Roman. Roman jurists define the contract as: "all voluntary acts generating an obligation, whether it was a bilateral or unilateral act, modern doctrine and legislation consider the bilateral agreement essential to the contract". The contract is a provenance of Roman law because, in Roman times, they considered the contract as the basis or origin of law. At the same time, the contract is seen as a legal act that is, as a voluntary act done between two or more persons entering into a certain obligation in a certain contract. For now, the contract is divided into two parts: bilateral contract and unilateral contract. The bilateral contract is poerque "derive reciprocal obligations in charge of both" i.e., it is a contract that arises an obligation that is binding for both contractors. While, the unilateral contract is a contract that "generates obligations only for one of the parties", from which an obligation is born and only one of the contractors is bound.

In Timorese legislation, we will first observe that, under the terms of the Civil Code of 2011 it is exhaustively listed in book II of Law of obligations in the special part. According to Article 345 (1) of the CCT, an "agreement is established whereby some one undertakes to conclude a certain contract, the

legal provisions relating to the promised contract are applicable, with the exception of those relating to form and those which, for their raison d'être, should not be considered to be extended to the promissory contract". Thus, based on the thoughts of the said authors about the contract, they are translated by which both parties enter into a contract, it is a definitive contract, but all with the same purpose in which, the promissory contract is to undertake a certain contract in the future. However, the promissory contract is a pact between two people to delimit some requirements or the assumptions to enter into a later contract, which is the definitive contract. While the definitive contract is at the time of transfer of a right in rem, each of them fulfilling its own obligation, one party delivers something and the other party must pay the price, (according to al.a.), b) and c) of Article 813 of the CCT).

As also provided for in the special part of the substantive law of our Timorese Civil Code of 2011 of paragraph 1 of article 343, it is established that the constitution or transfer of rights in rem over a given thing is for the mere effect of the contract, except for the exceptions provided for by law. So the number of this regime enshrines the principle of consensualism. This means that contracts which entail the constitution or transfer of rights in rem over certain and certain things produce, as a rule, by themselves,

this consequence, that is, by the exclusive result of the consent of the parties legitimately manifesting and at the very moment without the need for any subsequent act.

The constitution of the right in rem is like an act "created from a right that did not exist previously and that, at the very moment of its constitution, is acquired by a subject." This means that the constitution of the right in rem is the act of constituting or transmitting a right or an obligation of one thing to another party, by which the law must be protected and authorized before the object of a legal relationship. In this case, where the promissory seller undertakes to transmit or constitute a right in rem over a certain thing and the promising buyer acquires that thing.

The definition of Real Estate

In Timorese legislation, we will first note that, under the terms of the Timorese Civil Code of 2011, movable and immovable things are exhaustively listed in the general part. Under Article 195 of the CCT it is considered to be immovable things that are beyond the other, (in paragraph 1) (a) are the rustic and urban buildings. And when, in the first part of paragraph 2 of that article, it is defined that the rustic building is understood as "a delimited part of the soil and the buildings existing in it that do not have economic autonomy", and how much in the second part concerns the urban building which is understood by "any definition incorporated by land, with the land that serves as a logadouro". Therefore, let us point out that goods are the things or objects that serve as the basis in a legal relationship that has economic and pecuniary value, however, goods in

an immovable relationship are "all those goods that cannot be removed from one place to another without damage to their substance." Therefore, immovable property is all things whose existence is permanent, that is, not to change, or not to move, nor transported from one place to another and without its form being altered by law cited by (Corte Real AG & Tilman CB, 2023).

THEORETICAL INQUIRY

The principle of equivalence means that "the legal provisions relating to the promised contract shall apply" (Article 345 (1) CCT). However, this principle has two meanings:

1. The general rules of legal business apply to the Promissory Agreement:
2. The specific rules of the Promissory Contract apply to the promissory contract.

But this general rule also contains two exceptions: as regards substance, the legal provisions relating to the promised contract "which, for their *raison d'être*, should not be considered to be extended to the Promissory Contract" (Article 345 (1) of the CCT) do not apply to the Promissory Contract; nor do the legal provisions relating to the "form" promise contract (Article 345 (1) CCT) apply to the promissory contract. For Antunes Varela, in the principle of assimilation only "the legal provisions relating to the promised contract are applicable" i.e., the promissory contract is subject to the same rules as the definitive contract. However, the general rules of the legal business and the specific rules of the promissory contract apply to the promissory contract. Nevertheless, there are two exceptions based on this precept such as the first relating to "the form

of the contract", and the second relates to the provisions which, for their *raison d'être*, cannot be regarded as extending to the promissory contract" (Part 2, 345 (1) CCT).

According to the Legal Dictionary of Ana Prata: "Legal business can, in principle, be validly concluded in any way". This means that the form of conclusion of the contract is free, that is, it does not depend on the public deed, (authentic document) or private document. The Principle of Freedom of Form or principle of consensuality is "the validity of a declaration of negotiation does not depend on observance in a special way, except when the law prescribes." It means that the parties are free to choose the means by which the contractor determines any form of the negotiating declaration. Except where the law defines in a special form "the validity of the negotiating declaration does not depend on the observance in a special way, except when the law requires it" (Art. 210 of the CCT). It means that each of the parties to the contract has the freedom or faculty to freely determine the form, but within the limits of the law, and that the parties are duly subject. However, within this contract there are two principles as previously mentioned: the principle of freedom of form and the principle of equivalence. That is a form of the **promissory contract in general or in a way that they normally used within the contract of purchase and sale, while this is a main form of the contract of purchase and sale of real estate that the law defines cited by (Corte Real AG & Tilman CB, 2023).**

When the proper regime of the promissory contract on the constitution of real right of immovable prop-

erty, the constitution of real right over building, or autonomous fraction of it, already built, the law requires for contract-promise the "face-to-face recognition of the signature of the promitente or promissory notes and the certification of the existence of the respective license of the use of construction". Thus, we understand that the form of the promissory contract in particular in the constitution of real estate right in relation to the building or autonomous fraction already built, under construction or to be constituted is legally required a written document signed by the contractors, and a document authenticated of the building use license. However, this mode embraces the principle of equivalence. Still, we find that the principle of the assimilation of the constitution of the right in rem of immovable property applies because it requires a formality, which by law is subject to an authentic or private document and written signed by both parties or penalties by a party. The law establishes that, "in the case of a promise relating to the conclusion of an onerous contract of transfer or constitution of a right in rem over a building, or an autonomous fraction thereof, already built, under construction or to be constituted, the document referred to in the preceding paragraph must contain the acknowledgement in person of the signature of the promissory or promissory note and the certification, by the notary, of the existence of the respective license of use or construction". (1.a part of Art. 345 (3) was to enter into a certain contract in the future, " presentation due by the parties corresponds to the CCT). However, the promissory contract is the agreement by which the promissory parties promise to issue a declaration of business will be intended to conclude the so-called promised or definitive contract" In the relationship of trans-

mission or constitution of right in rem the omission can only be invoked when it is caused by a defaulting promissory agent. (2.a part of Art. 345 (3) CCT).

LITERATURE REVIEW

Legal Amendment of the Promissory Contract

In a legal sense the promissory contract for the constitution of a right in rem of immovable property in the CCT, which is approved by Law No 10/2011 of 14 September, namely in the area of law of obligations provided for in Articles 345 to 348, in which the conclusion of a promissory contract for the transfer or constitution of a right in rem applies, where it deals with a matter that is in private law and not in public law. The notion of the legal relationship of the contract-promise is found in the Timorese Civil Code, which in Articles 376 to 377, enshrines the character of sign of the contract-promise, is how Article 765 provides for the specific execution of a contract-promise. The effects of the promissory contract occur when it does not perform the performance that is required by the parties to the contract. Thus, its effects generate the following demands, such as: breach of the contract and its modalities.

Non-compliance is the "objective situation of non-realization of the debitory provision and dissatisfaction". In this case, non-compliance is an act of not fulfilling the benefit to which it is attached. There is default when a prospective buyer fails to perform its obligation within a contract. Thus, we understand that the breach of the promissory contract consists of the promissory debtor of the performance of the promised contract. That is, they define that the cause of non-compliance with the promissory contract is to have a declaration of nullity of the contract, that is,

that the contract is ineffective.

The effects of the modalities of non-compliance with the promissory contract include two main modalities: late payment and final non-compliance.

1. Delay consists of "delay or delay in fulfilling the obligation." It means that the default exists when the contractors do not perform or fulfill the service in the given time. The default may be of both the debtor and the creditor, according to Articles 738 and 747 of the CCT.
2. The definitive non-performance of the promissory contract consists when the "conclusion of the promised contract has become impossible or when, due to delay, it has not been concluded within the new reasonable period granted by the faithful promissory note". It is not possible to fulfill the promissory contract when the provision becomes indispensable until a certain date, and it is considered as non-fulfillment of the obligation. (Art. 742 (1) CCT).

Thus, we have two situations, the situation of delay and the definitive non-compliance, that when stipulated a deadline for the conclusion of the promissory contract is not fulfilled and this when there is loss of the creditor's interest in the performance of the promised contract.

Types of Breach of Promissory Contract

Second, Luiz Menezes Teles de Menezes Leitão considers that, "the law admits the specific execution of this obligation, which consists of the debtor being replaced in the fulfillment, obtaining the creditor the satisfaction of his right by judicial means". In this idea, "the specific execution will consist of the court

issuing a judgment that produces the same legal effects as the business declaration that was not made, thus effecting the constitution of the definitive contract". However, the specific performance of the promissory contract takes place when one of the defaulting contractors does not enter into the definitive contract, or does not punctually fulfill the promise, so another party of the faithful contractor may request the court to issue a judgment that produces the effects of the negotiable declaration of the defaulting promissory officer, because all contracts must be fulfilled punctually; it is the case as the principle pacta sunt servanda as laid down in Article 341(1) of our CCT. Based on this principle, the judgment can be produced to have legal effects of the definitive contract in a given cited by (Corte Real AG & Tilman CB, 2023).

Specific enforcement is understood as a judicial means of overcoming the non-compliance or irregularity of the will of the defaulting promissory officer and to fulfill the conclusion of the definitive contract. In addition, to protect the satisfaction of the right of the faithful promitent. However, in this view, the effects of non-compliance with the obligation of the promissory note may be corrected, i.e., it must be known that the specific execution is a means of guarantee by which the faithful promitent will request the court that, in the promised contract, the defaulting promitent in the absence of a declaration of negotiation the faithful promitent is carried out by means of the coercive judicial performance or by the judgment of the Court. Specific enforcement is of a supplementary nature, i.e., it is not an imperative rule and both parties may dismiss it by agreement in contract (Article 765 (2) CCT). It

is presumed that the parties dismiss the specific execution if they constitute a signal and if they stipulate a penalty for non-compliance. This is a jurisprudantum presumption which can be rebutted by proving otherwise (Art. 377 (1) CCT). Even so, there may always be specific execution in the promissory contract relating to the conclusion of the onerous contract of transfer or constitution of a right in rem over a building or autonomous fraction thereof, already built or to be built, according to the legal rule of the Timorese Civil Code established in paragraph 3 of article 345 CCT) must take into account the recognition and signature in person of the promissory parties, and must have a notary's certification to have a respective license of use, or both parties may invoke the omission in which case each of them culpably caused by the other party. Article 765 (3) is referred to as an imperative rule simply because it allows the court through the legislature to make a declaration to the defaulting promisers.

Termination of the Contract

The termination of the contract is an extinction of the contractual relationship, in which, one of the contractors does not perform the service on the agreed date or because of loss of the interest that the contractor had in the performance. However, the consequence generates the termination of the Promissory Contract when in a situation of definitive default attributable to the debtor. Thus, according to Pedro Romano Martinez, the termination of the contract is the means of "dissolution of the contractual bond by unilateral declaration and is conditioned by a reason provided for in the law or depends on the agreement of the parties." It means that the termination of the contract is a form of de-

struction of the contractual relationship, in which one of the contractors by unilateral will extinguishes the contract, based on the law or the agreement of the parties. On the other hand, Mario Julio Almeida Costa distinguishes that, in the resolution of the promissory contract "injunction, whether or not there is a signal". Therefore, "in the absence of this, the indemnity is determined of harmonia with the general rules of civil liability and tends to cover the actual damages". It means that you can resort to compensation as a rule that guarantees the act of seeking the performance of an obligation or to respond to the acts of the affected owner. Then, where there is a signal in the past, the promissory contract has several solutions which are provided for in Article 377 of the CCT. Therefore, the termination of the contract is a means of terminating the contract, whereby (according to Article 367 (1) of the CCT), "termination of the contract based on law or agreement is permitted". This means that the termination of the contract is the termination of a contract established in the law in force cited by (Corte Real AG & Tilman CB, 2023).

METHODOLOGY OF RESEARCH

We use the inductive methodology is based on the consultation of the reference books in the library, and in this elaboration the internet is also used as an auxiliary means. Throughout the research and documentary analysis of knowledge of science and argumentative both legal and literary.

DISCUSSION

The effectiveness of the contract is the "production of the legal effects proper to the contract. When a contract contains all the requirements, substantial

and formal, necessary for its formation, it is valid", then, in principle, act produce the respective legal effects. What it means, contracts can have effects of a legal nature within those requirements, that is, when it fulfils those requirements, it is fundamental-ly because it can produce its legal effects, but when it does not observe both requirements, it is considered ineffective because it does not respect the general rules of the promissory contract, as stated earlier in chapter two on the substantial and formal requirements. The promissory contract creates an obligation to contract for the contractors. The objective is a de facto performance, and the contractors have the obligation to enter into a legal transaction in principle the parties enjoy only the obligatory effectiveness of the legal business (Article 341 (2). From the CCT). But you can attribute the actual effectiveness to the Promissory Contract when it comes to a contract of encumbrance of a certain thing. (Art. 348 CCT). In the effectiveness of the Promissory Contract, we have the obligation effectiveness and real effectiveness, which will be addressed, the following.

Obligation Effectiveness of the Promissory Contract

As a rule, in the general regime of buying and selling we verify the "obligation to deliver the thing and to pay the price". That is, a contractual obligation that is binding between the contractors. Consequently, they must fulfil their delivery obligations and pay for the good. According to Joana Dias Catarino, "the promissory contract only produces inter partes effects". This means that, as a rule, the promissory contract produces the effectiveness of a merely obligatory nature. That is, the effects are binding between the contractors who conclude the contract.

Real Effectiveness of the Promissory Contract

The real effectiveness of the counter-promise is a contract of an erga omnes nature, it means an absolute contract and against all, and at the same time falls on all the contractors in relation to third parties. Article 348 (1) of the STC provides that the promise of transfer or constitution of rights in rem in respect of immovable or movable property subject to registration, the parties may assign the actual effect, by means of express declaration and entry in the register, while paragraph 2 provides for the form of the public deed for promises in which the parties attribute real effect. For Santos Justo the Attribution of Real Effectiveness "is a Legal business in which one of the parties promises to transmit or constitute a right in rem over immovable or movable property subject to registration that, by express declaration and registration in the register, enjoys real effectiveness". When one of the assumptions of the contract is missing, even if valid, it generates the obligation effectiveness, that is, it is not the one that can be relied on third parties. Still, the alignment or encumbrance of something other if there were "the oponibiledede erga omnes of the promise determined the ineffectiveness of the acts performed in their violation." In the event that the promissory seller does not fulfill his promise, but it is still possible to fulfill it, "the promissory officer may resort to specific execution". If the non-fulfillment of the promise the thing has been aligned on the part of the promising seller and by a third party, then the promitent buyer "is entitled to perform a performance of the promising seller, the specific execution is totally excluded and, as such, the latter will not be able to achieve the thing". This situation implies the definitive non-compliance with the promissory contract. In the

same way as "the specific execution against the obligee, applying in relation to the third party the regime of the sale of other people's goods, which allows to demand immediately from him the restitution on the basis of the nullity of sale". i. and the promissory seller do not have the legitimacy to sell the thing to a third party, in this case the promissory buyer is entitled to specific execution to demand his right, in accordance with the agreement cited by Corte Real AG & Tilman CB, 2023).

However, to the effects in relation to the third parties, the specific execution that gives it the right in rem of acquisition of the thing refuses to fulfill the promise, and another party authorizes to demand already to develop what was given. If the thing has been disposed of by a third party, the promising-buyer has a right to claim the specific execution in order to be condemned to the promising-seller and the third party to hand over the thing to him. The actual effectiveness of specific enforcement corresponds to "a constructive declaratory action, possibly complicit with a claim for restitution, to be instituted in necessary lis consocio against the promissory party and the third-party acquirer, aimed at making prevail the right of acquisition of the prospective purchaser over the acquisition of that third party". It means that the faithful contractor declares that he wanted the court to analyze the legal relationship between the contractors with the aim of creating a legal situation to alter or extinguish the legal relationship. And the faithful promitente declares to demand his right of indemnification, he wants the court to jointly assign the importance of the right of acquisition to all the promitters and the third party. This is the case of (al. c of paragraph 2 of article 2

of the CPCT). To summarize, the obligation effectiveness refers to whenever it comes to the effects of attributing an obligation situation, while the real effectiveness falls directly on a situation of the law of things, which is based on Timor-Leste law cited by (Corte Real AG & Tilman CB, 2023).

CONCLUSION

We conceive that the Promissory Contract is an obligation that has as its object the performance of a promised contract, namely the transfer or constitution of a right in rem of immovable property. The performance of the promissory contract is a mission of the negotiating declaration whose conclusion of a performance of legal fact consistent with the clause of the promised contract. It also designates that the promissory contract assumes great relevance in the legal task of the constitution of real right of immovable property and there are reasons that justify its uses. In Timor-Leste there are many vicissitudes or obstacles in the conclusion of the promissory contract and in particular in the promised contract. Normally, in the contract the promitters enter into the said contract but, for different reasons, do not meet the requirements established within the contract and even some try to depart from the law and the legal procedure.

As a result, there is a breach of this contract, as there are several reasons to justify the non-performance of the definitive contract. Hence it is tried to make available and deepen on the formalities of the constitution of real right of immovable property, however, so that the contract is valid clear that they need a face-to-face recognition of signature of the contractors and the certification by the notary of the ex-

istence of use of construction.

However, it should be noted that the contract must respect the principle of *pacta sunt servanda* in the sense that the contract must be performed punctually means that the parties are bound in good faith, transparency, fairness, honesty so that the contracts produce effects in the performance of the definitive contract. It concludes that, that contract requires the will of the parties of the contractors to respect the principle of good faith in the performance of the contract as the promised contract, and at the same time to comply with all pre-existing legislation with the aim of ensuring or preserving the conclusion of a business which it establishes in the future which did not necessarily bring absolute veracity as enshrined in the promissory contract convention. Because it is considered as a guarantee, that is, the best way to protect the interests of the promittent in substantive and real terms in the implementation on the ground cited by (Corte Real AG & Tilman CB, 2023).

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